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The Position of High Courts.

A memorandum presented to the Indian Statutory Commission by the Government of India on the subject of THE POSITION OF HIGH COURTS.

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A memorandum presented to the Indian Statutory Commission by the Government of India on the subject of the POSITION OF HIGH COURTS.

Division of functions for the administration of justice.

1. From a date not later than the first constitution of High Courts under the High Courts Act, 1861, the executive function of the administration of justice has been shared between various authorities. The "act of judging" is, of course, a judicial function, and is not at present in question. It belongs to the courts alone. But in addition to their judicial functions the High Courts have always possessed executive or administrative functions. Some at least of these executive functions of the Courts are subject to the control of the executive Government which is normally, but not always, the Government of the province. The remaining functions which go to make up "the administration of justice" are exercised by the executive Government, being distributed among various authorities in a manner which is not altogether uniform. The question at issue in this memorandum is the definition of the executive authority which should exercise control over the administrative functions of the High Courts and should perform the other functions relating to the administration of justice which affect these Courts.

The Normal Case.

The appointment of High Court Judges and their tenure.

2. The authority to establish by Letters Patent a high court of judicature in any territory in British India rests in His Majesty alone, and all High Courts now existing in India have been established by the exercise of this authority. Every judge of a High Court holds office during His Majesty's pleasure. Additional judges, however, who may be required for any period not exceeding two years, are appointed by the Governor-General in Council, and temporary vacancies in the office of Chief Justice or other judge may be filled by appointment made by the local Government. The salaries and certain other conditions of service of judges of High Courts are fixed by rules made by the Secretary of State in Council. The local limits of the jurisdiction of a high court may be altered by order of the Governor-General in Council. A Judge on assumption of office makes his declaration before an authority prescribed by the Governor in Council; on demitting office he tenders his resignation to the local Government.

The administrative powers of High Courts.

3. The administrative functions of the High Courts, apart from particular quasi-administrative or judicial functions assigned to them by specific Acts, are described in the Government of India Act and in the Letters Patent by which each court was es-

tablished. Section 106 of the Act confirms to the several high courts "all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the court, and power to make rules for regulating the practice of the court, as are vested in them by Letters Patent, and, subject to the provisions of any such Letters Patent, all such jurisdiction, powers and authority as are vested in those courts respectively at the commencement of this Act." Section 107 recites the Court's powers of superintendence over all courts for the time being subject to its appellate jurisdiction, and its particular powers to call for returns, direct transfer of suits or appeals, make rules regulating the practice of subordinate courts, prescribe forms and settle tables of fees. The Letters Patent confer on the Chief Justice powers to appoint clerks and other ministerial officers and to make rules for the qualification and admission of advocates, vakils and attorneys. The powers conferred on the Court by particular Acts need not at present be set out in detail, but it is important to refer to the powers conferred by various provincial Civil Courts Acts in the matter of the recruitment and control of the subordinate civil judiciary. In Madras and Burma the appointment of Munsifs or Sub-judges is made by the High Court; in Bombay and the Central Provinces such appointments are made by the local Government, while in Bengal, Bihar and Orissa, Assam, the United Provinces and the Punjab the appointments are made by the local Government on the nomination of the High (or Chief) Court.

The particular powers of the executive.

4. The particular administrative powers of the executive are, first, the powers regarding the constitution of the High Courts which have already been described; second, the executive control to which the administrative functions of the High Courts have been made subject, and third, specific powers which have been conferred by legislation.

Instances of the second category are contained in section 107 of the Government of India Act, in the Letters Patent of each court, and in Acts such as the Civil Procedure Code and the Criminal Procedure Code. Rules, forms and tables made, prescribed, or settled under section 107 of the Government of India Act require the approval of the local Government. Under the Letters Patent the appointment of clerks and ministerial officers is regulated by rules made by the Governor in Council. The same authority prescribes rules for the leave of absence of such clerks and officers, and his approval is required to the salaries fixed for them by the Chief Justice. In the second category also come the requirements of section 126 of the Civil Procedure Code which make necessary the approval

of the local Government to rules made by High Courts annulling, altering or adding to the rules in the First Schedule to the Code. Similarly, section 554 of the Criminal Procedure Code requires the previous sanction of the local Government to rules made by a High Court in certain matters of criminal administration. A further instance is the power given to the local Government by section 335 of the Code of Criminal Procedure to regulate the places at which the High Court shall hold its sittings.

The third category includes all those numerous powers for particular occasions and purposes which are conferred by statute, particularly by the Codes of Criminal and Civil Procedure. It is unnecessary at present to prepare the elaborate lists in which alone they could be displayed.

The general powers of the executive.

5. The general powers of the executive arise from its obligation to constitute and maintain courts of criminal and civil jurisdiction in sufficient numbers and with adequate efficiency. These powers have no doubt a definite statutory basis, but they are also inherent in the nature of government. In practice and for the present purpose one of the most important of these functions is the function of making adequate financial provision from year to year for the exercise of the administrative functions whether these functions are performed by the executive itself or by the High Court.

The allocation of functions between executive organs—Pre-Reform.

6. The administrative functions now exercised by the High Courts are derived from the Letters Patent and from certain provisions contained in the Government of India Act, 1915, and have not been altered by the Reforms. But the seat of the administrative functions exercised by the executive has been profoundly affected by the new constitution. The introduction of the reforms did not affect the administrative functions entrusted to the High Courts by specific Acts, nor did it, save for the changes of detail made by the Devolution Act, 1920, make changes in the particular functions assigned by such statutes to the local or the central Government. But it altered the bases of general administrative authority. Prior to the coming into operation of the constitution set up by the Government of India Act, 1919, there was no classification of subjects as central and provincial, and consequently no formal assignment of general administrative responsibility in relation to any particular function of government to the Government of India as opposed to the local Government or *vice versa*. In the financial sphere there was no real separation between central and provincial revenues, but inasmuch as the revenue and expenditure of all the High Courts were included in a so-called provincial head, that revenue and expenditure figured in the annual financial state-

ment of the local Government concerned and was open to discussion in the local Legislative Council in accordance with rules made under sub-section (3) of section 80 of the Government of India Act, 1915.

The allocation of functions between executive organs.—The Reforms.—Devolution Rules.

7. The scheme propounded in the Report on Indian Constitutional Reforms and thereafter embodied in the Government of India Act, 1919, necessitated a formal classification of all the subjects of government as central and provincial subjects and the treatment proposed for the High Courts in this respect by the first authority charged with the duty of formulating proposals for the classification of subjects, namely, the Feetham Committee, would have made the constitution and powers of all the High Courts a central subject. For entry 16 in the list of provincial subjects proposed by that Committee ran as follows :—

> "Administration of justice, including constitution, maintenance and organization of courts of justice in the province both of civil and criminal jurisdiction, but exclusive of matters relating to constitution and powers of High Courts, and subject to Indian legislation as regards constitution and powers of courts of criminal jurisdiction"

and the exclusion of matters relating to constitution and powers of High Courts would have brought those matters within the Committee's proposed central subject 39, namely, "all matters expressly excepted from inclusion in the provincial list".

The Government of India, commenting on the proposed provincial entry in question in paragraph 64 of their 4th reforms despatch, observed as follows :—

> "Item 16 would give the provincial legislatures power to alter without previous sanction the jurisdiction of civil courts. Changes may possibly be made which will react not merely on the public but on the High Courts and the Privy Council, but we are prepared to face this contingency. We think that in addition to matters relating to the constitution of High Courts, matters relating to the constitution of Chief Courts and the Courts of Judicial Commissioners should also be excluded. The definition of the item as a whole seems capable of improvement and we suggest the following re-draft :—
>
> 'The administration of Justice including the constitution,

organization and powers of Courts of civil and criminal jurisdiction within the province other than a High Court, a Chief Court, or the Court of a Judicial Commissioner, but subject to Indian legislation as regards Courts of criminal jurisdiction.'."

Under this draft the constitution, organization and powers of the High Courts would have been made a central subject by virtue of exclusion from the proposed provincial subject.

Commenting on the re-draft suggested by the Government of India in a memorandum presented to the Joint Select Committee on the Bill which became the Government of India Act, 1919, Messrs. Feetham and Stephenson observed :—

"The intention of the Committee was to reserve the constitution and powers of High Courts, which are at present regulated by the Government of India Act and by Letters Patent, as an All-India subject, while leaving the provinces freedom to legislate with regard to other courts, subject to previous sanction as regards courts of criminal jurisdiction. The Government of India propose to put Chief Courts and Courts of Judicial Commissioners on the same footing as the High Courts in this respect (a course to which we see no serious objection), and also to make 'organization' as well as the constitution and powers of all these Courts an All-India subject. Organization of the High Courts, as distinguished from their constitution, would appear to be a matter which should be dealt with by the province which is responsible for their maintenance, but it is probably best to avoid using these terms for the purpose of making a distinction between All-India and provincial powers. The simplest plan would be to make all matters affecting these Courts subject to Indian legislation, and it is suggested that the entry might take the following form :—

'Administration of justice, including the constitution, powers, maintenance and organization of Courts of civil and criminal jurisdiction within the province, subject to Indian legislation as regards High Courts, Chief Courts,

and Courts of Judicial Commissioners and any Courts of criminal jurisdiction '.

There is no intention to affect the provisions of the Government of India Act with regard to High Courts, including those provisions which bring the High Court of Calcutta into special relation with the Government of India; the rules of classification, of which this list will form part, will necessarily be subject to the provisions of that Act, and there does not seem, therefore, to be any need for a special reference to the Act in this entry. To prevent misconception, the point can be covered by a general statement in the rules ".

Subsequently, however, the proposed method of treatment underwent radical alteration. An India Office reforms committee revised the relevant entry in the provincial list to read—

" Administration of justice including the constitution, powers, maintenance and organization of Courts of civil and criminal jurisdiction within the province, subject to Indian legislation as regards High Courts, Chief Courts and Courts of Judicial Commissioners and any Courts of criminal jurisdiction ".

The point was referred to in the oral examination of Messrs. Feetham and Stephenson to whom Lord Sinha put the following question :—

" No. 16* is more or less drafting is it not ?"

Mr. Feetham's reply was :—

" No. 16, I think, might be described as a drafting amendment.....".

In their report on clause I of the Bill the Joint Select Committee observed :—

" The lists of central, provincial and transferred subjects included in the Functions Committee's report have been somewhat altered after consultation with the India Office, and as so amended, they are accepted by this Committee ".

In pursuance of this general acceptance of the lists of subjects as altered after consultation with the India Office, entry 17 in the list of provincial subjects set

*I.e., the re-draft as amended by the India Office Committee.

forth in Part II of Schedule I to the Devolution Rules reproduces the final re-draft of the Committee's entry 16 and reads as follows :—

> " Administration of justice, including constitution, powers, maintenance and organization of Courts of civil and criminal jurisdiction within the province ; subject to legislation by the Indian Legislature as regards High Courts, Chief Courts, and Courts of Judicial Commissioners and any Courts of criminal jurisdiction ".

The same—a possible misconception.

8. It has been contended that the description by Mr. Feetham of the re-draft of original entry 16 as " more or less drafting " and the acceptance of that description by the Committee embodied a very serious misconception. The original draft of the Feetham Committee and the revision thereof by the Government of India agreed in this that the High Courts were, in whole or in part, expressly excluded from the proposed provincial subject, and by virtue of that exclusion included in a central subject. The draft finally adopted excluded nothing from the content of the provincial subject with the result that the High Courts are wholly included in that provincial subject. The subjection of High Courts to legislation by the Indian Legislature which Mr. Feetham appears to have regarded as serving by an alternative method the ends which would have been served by making them a central subject has in fact no such effect.

The operation of the Devolution Rules is of course subject to the Act with the result that the vesting by sections 106 and 107 of the Act of functions with reference to a High Court in the Governor-General in Council or the local Government is not capable of being affected by the inclusion of High Courts under the Devolution Rules, either in a central or in a provincial subject, but over and above the statutory functions assigned to a particular governmental authority by those sections there remains a residuum of functions with reference to a High Court which are in the nature of things exerciseable by the executive Government. The inclusion of High Courts in a central subject would have caused these residuary functions to vest in the Government of India. The subjection to legislation by the Indian Legislature of the provincial subject in which the High Courts were finally included has no such effect. *Per contra*, the provinciality of the subject has the effect of vesting them in the local Government. From a practical point of view, however, the inclusion of High Courts in a provincial subject has its most important effect in bringing the

High Courts into relation with the local legislature. Because High Courts are included in a provincial subject, the financing of High Courts is a charge on provincial revenues, with the result that it is the local legislature which votes the High Court budget, while for the same reason such powers of influence as result from the right of interpellation and the right to move resolutions accrue to the local legislature.

The Calcutta Case.

The position of the High Court at Fort William in Bengal.

9. The position of the High Court at Calcutta differs from that of other High Courts less in regard to the distribution of functions for the administration of justice between judicial and executive authorities than in regard to the selection of the particular executive authorities for the exercise of functions assigned to the executive. The provisions of the Bengal Civil Courts Act are not precisely the same as those of similar enactments in other provinces. But, generally, the same administrative functions are in all provinces entrusted to the High Court and the executive, whether by statute or by Letters Patent. In Bengal, however, certain important functions involving control over the High Court, which have in other provinces been committed to the Governor in Council, have been entrusted to the Governor-General in Council.

The Government of India Act requires a judge of the Calcutta High Court on vacating office to tender his resignation to the Governor-General in Council (section 102). Appointments to temporary vacancies in the office of Chief Justice or Judge are made by the Governor-General in Council. The same executive authority must be addressed for the grant of his previous approval to rules made, forms prescribed and tables of fees settled by the Court. The Letters Patent of the Court (Article 5) requires a Judge on assumption of office to make a declaration before an authority prescribed by the Governor-General in Council. The control which in other provinces the local Government exercises over the clerical and ministerial establishment of the Court is in Bengal exercised by the Governor-General in Council (Article 8). The same differentiation is made in sundry provisions contained in the Indian Statute Book. Thus, by virtue of section 126 of the Code of Civil Procedure, 1908, rules made under section 122 require the previous approval of the Governor-General in Council. He too, and not the Government of Bengal, may determine the place at which the Court shall sit to dispose of criminal business, and may approve of judges going on circuit (Code of Criminal Procedure, section 335). His sanction is required to rules for the inspection of the

records of subordinate courts (*Ibid* section 554).

The resulting anomaly.

10. This disposition of authority peculiar to Bengal dates in its present form from the first constitution of the Court under the High Courts Act, 1861. But it has its roots in a much older past. In pre-reform days it raised in practice no insurmountable difficulties. It is true that the local Legislative Council set up under the Act of 1909 had powers to discuss the budget, and to debate matters relating to the administration of justice by the High Court. But the Council had no powers to grant or withhold supply. The local Government had no inherent authority. It was in theory an agent of the central Government whose directions it was bound to carry out. In particular the central Government was competent to direct the local Government to make such financial provision for the needs of the High Court as the Governor-General in Council considered necessary.

The position was materially altered by the Government of India Act and the rules under it. The local Government was given powers of its own, including powers for the administration of justice. The local legislature was made independent of the executive, entrusted with control or influence in a sphere corresponding to the functions of the local executive, and empowered to grant or withhold supply. Administration of Justice by the local Government was made a reserved subject and therefore remained under the unrestricted superintendence, direction and control of the Governor-General in Council. Nevertheless, the anomaly remains that the Government of Bengal has been assigned a responsibility for and the Bengal Legislative Council a concern with the administration of the Calcutta High Court notwithstanding the fact that important statutory powers in relation to the Court are vested in the Governor-General in Council. The anomaly assumes its most acute form in the financial sphere, for the financial responsibility of the local Government and the local legislature for the court is not limited in the manner in which the administrative authority of the former has been limited by the functions entrusted to the Governor-General in Council.

The Paper Book Department Demand, and subsequent discussions.

11. This anomaly manifested itself in an acutely practical form at a very early stage in the history of the reformed constitution. A demand for expenditure in connection with the High Court containing items which had received the approval of the Governor-General in Council in accordance with Article 8 of the Letters Patent was placed before the Bengal Council in March, 1921, and rejected. The Governor of Bengal took the view that, inasmuch as the authority conveying ad-

ministrative sanction to the expenditure was the Government of India, he as Governor had no responsibility for the administration of the subject to which the demand related and was therefore incompetent to certify the expenditure in accordance with proviso (*a*) of sub-section (2) of section 72-D, as essential to the discharge of his responsibility for the subject. The Government of India were clearly of opinion that, inasmuch as the demand related to a provincial reserved subject, responsibility did rest with the Governor and that he was competent to certify. In the result the Governor did issue the necessary certificate but the unsatisfactory nature of the position is clearly exhibited in the following observation contained in a letter addressed to the Government of India by the local Government :—

> "His Excellency in Council will restore the grant as directed by the Government of India. I am, however, to observe that, while the Governor in Council is ready to act on the instructions of the Government of India, he is not prepared to act on his own initiative in matters affecting the High Court since he has not the right to pass orders on matters which form the subject of correspondence between the Honourable Judges and the Government of India and upon which the Government of India themselves pass orders."

It was equally exhibited in the form of the Governor's certificate which was worded as follows :—

> "Whereas I have been directed by the Government of India to provide a sum of Rs.....for the Paper Book Department of the High Court under head 24-A, Administration of Justice, and whereas the Bengal Legislative Council has refused its assent to a demand for a grant for this purpose, I, therefore, hereby certify that the expenditure provided for by this demand is essential to the discharge of my responsibility for the subject."

The Government of India fully recognized the anomaly attending the vesting in themselves of specific powers in relation to the Calcutta High Court while that Court was included in a provincial subject, and they proposed to cure the anomaly by leaving the classification of subjects untouched and by bringing the position of the Calcutta High Court with reference to the specific powers in question into line with the position of the other High Courts by amending the Government of India Act, the Letters Patent of the Calcutta High

Court and the Indian Statute Book in such manner as to transfer the powers in question to the local Government. Proposals to this end were placed before the Calcutta High Court in the Home Department letter no. 1359, dated the 18th July, 1921, and evoked a strenuous protest voiced in a letter from the Registrar of the High Court, no. 5245-G., dated the 12th September, 1921. That letter admitted the anomaly, but put forward the contrary remedy of making the Calcutta High Court—and incidentally all other High Courts—a central subject. Considerable stress was laid by the Judges on the history of the existing provincial classification as described in paragraph 7 of this note. The alternative proposal of the High Court did not commend itself to the Government of India, but in deference to the opposition of the Judges to the Government proposal, the latter was not proceeded with and the question has since remained in abeyance.

Points of present agreement—The broad issue.

12. The foregoing account should have made it clear that the administrative control exercised by and over the High Courts is part of the general administration of justice. It has, however, in the past been possible to give separate treatment to this question of the High Courts and there are advantages in keeping it distinct now, provided that the matters which are and are not in dispute can be clearly distinguished. The problem has emerged in connection with the High Court at Calcutta and on account of the anomaly there inherent in the division of executive functions between the central and the local Governments. But it has at once taken a wider scope, for all High Courts are concerned as soon as the issue arises whether a local executive or legislative should possess any powers to control or influence the administrative acts of a High Court.

So far as discussions have gone there are several important points on which there is agreement or which at least have not been challenged. These points may therefore be excluded for the present from consideration. First, the question of the appointment of Judges of High Courts and the conditions of their term of office is not in issue. Minor matters, such as the filling of temporary vacancies, and the procedure on the assumption and demission of office are not subjects of agreement. Bu they do not affect materially the conditions of appointment and of tenure, and they can be settled independently of the decision regarding control of the administration by the High Court.

Second, it is not contended that the administrative functions of the High Court, except possibly those entrusted to them by provincial Civil Courts Acts, should be withdrawn or curtailed. Amendment of the Letters Patent or of the provisions of

the Government of India Act with this object has not been suggested.

Third, it is apparently agreed that the administrative functions of the High Court cannot be irresponsible. There must be control by some executive and a power of control or influence in some legislature. It has not been contended that the present restrictions on the administrative powers of High Courts, such as the requirement of previous sanction by executive authority to rules which the Court proposes to issue, should be removed. Nor has it been suggested that the administration of justice by a High Court should be removed from the cognizance of every legislature, whether by exclusion of supply from the estimates or by a rule in restraint of discussion.

Lastly, the powers of the local Government and the local legislature for the administration of justice, whether they are derived from specific statutory provisions such as those contained in the Codes of Civil and Criminal Procedure or are a consequence of the constitutional arrangements made by the Government of India Act are not in question, save in so far as they affect the administrative functions and the authority of the High Court.

The broad issue then is this. On the assumption that the existing administrative functions of the High Courts are maintained, subject to the existing restrictions arising from the control of the executive and the powers of the legislature, by what executive authority should that control be exercised and in what legislature should these powers be vested ?

The Arguments for Centralization.

Relations of the High Court and the Legislature.

13. The primary advantage of centralization is that its adoption would remove the High Courts from undesirable political influences by bringing all matters relating thereto within the purview of the central legislature and removing them from the jurisdiction of the local legislature. The importance of this aspect of the case may be gauged from a perusal of the cases collected in an appendix to this note in which the existing system has exposed the High Courts to criticism and censure in the local councils, where under the existing system the High Court budget is voted. It may be contended that in the majority of these cases the criticism levelled against the High Courts has not only been factious and ill-informed, but has also tended to bring the Courts into contempt in the estimation of the public. A central legislature, whatever its faults, would, it may be hoped, be unlikely to afford any support to an attempt to base a censure of a High Court on *e.g.*, the low proportion of the representatives of a particular community in its ministerial establishment. While the consequences in this respect of the provin-

cialization of the High Court have been serious enough under the existing régime, it may be urged that the subjection of the budgets of those Courts to a majority vote in a legislature to which the executive was responsible would be attended with intolerable consequences, and that centralization of the High Courts would be an inevitable concomitant of the establishment of anything in the nature of provincial self-government.

Relations of the High Court and the local Government.

14. But consideration cannot be confined to the relations between the High Court and the legisature. The relations between the High Court and the executive are equally important, and there can be no doubt, it may be contended, that those relations are far more likely to be harmonious if the executive with which the High Court has to deal is the central executive with its relatively detached position. In the Calcutta case in particular, the Registrar's letter to which reference has already been made shows how far from satisfactory the relations between the High Court and the local Government of Bengal have been in the past and how remote would be the prospect of satisfactory co-operation between the judicial and the executive authority if effect were given to the first of the two alternatives under consideration.

The High Court at Calcutta.

15. The case as it arises in Bengal presents special features, for there a degree of centralization has been achieved, and the High Court has a long and distinguished history of its own. The Honourable the Chief Justice and Judges have, therefore, stated the case for centralization in their Registrar's letter in an unreserved expression of their opinion. They point to the vital importance of maintaining the independence of the Court and refer to their long experience of attempts by the local Government to interfere with that independence and with the independence of the Courts over which the High Court has superintendence. The Court must not only be free from such interference but must be free to intervene when the excesses of the local executive may imperil, as they have, in the past imperilled, the liberties of the subjects. They consider the subordination of the Court to a member of the Executive Council of His Excellency the Governor to be a position inconsistent with the history and traditions of the Court, and they refuse to accept a situation in which any member of the Bengal Legislative Council could call for or move for records, returns and statements from the High Court as to the manner in which the Judges discharged their judicial functions or in which the local Government, which is subject to the influence of the Bengal Legislative Council, would exercise a potent voice in determining His Majesty's pleasure during continuance of which the

Honourable Judges hold office. They point out that the Schedule to the Devolution Rules was framed under the misconception to which reference has already been made. Financial responsibility for the Court should, they consider, rest with the central Government in order that the Court may be removed from the sphere of local politics. Finally, they lay stress on the historical relations which have existed between the Representative of the Crown and the Judges of the Court for over 150 years.

The Arguments for Provincialization.

Negative arguments—Difficulties of Centralization.

16. The supporters of provincialization employ both negative and positive arguments. They meet the case for centralization by laying stress on the considerable difficulties which would attend it and by disabling the arguments by which it is sought to justify it. Those difficulties comprise—

(*a*) the absence of the requisite local knowledge which would enable the Government of India adequately to discharge the specific statutory functions which are now assigned to them in the case of the Calcutta Court and which would in the event of centralization be assigned in the case of all the High Courts, *e.g.*, the selection of temporary Judges from among a personnel, with the merits of which the local Government are in the nature of things more familiar than the Government of India ; and the sanctioning of expenditure to meet needs the reality and urgency of which cannot be justly estimated in the absence of local knowledge.

(*b*) the risk of a conflict of administrative authority over the subordinate courts, which by universal consent must continue in the provincial sphere, between (*i*) the local Government, which would continue to possess such authority by virtue of its responsibility for the administration of a provincial subject and of the fact that, in the majority of provinces, the provincial Courts Act vests the power of appointment to subordinate judicial offices in the local Government, and (*ii*) the High Court, which would also continue to possess such authority by virtue of the provisions of section 107 of the Government of India Act but which, with the High Courts centralized and with the statutory and Letters Patent powers transferred to the Government of India, would cease to have any administrative relations with the local Government.

(*c*) the practical impossibility of the Government of India exercising

the functions vested by various statutes in the local Government.

Negative arguments—The arguments for centralization examined.

17. It may be argued that centralization and provincialization in the sense relevant to the present discussion raise no question of the judicial independence of the High Courts. It is well established in political theory and in general constitutional practice that the judicial independence of the judges is secured by the nature of the tenure of their office. Ordinarily it is considered to be an adequate safeguard that judges should hold office during good behaviour and that the power of dismissal required to meet cases of misbehaviour or grave unfitness should be normally exercised by a body of judges of the highest grade. But the provisions of the Government of India Act are even fuller safeguards of the judicial independence of the Judges of High Courts. It is not proposed to diminish them. Indeed, the case for provincialization would be in no degree weakened if the power which local Governments at present possess to fill temporary vacancies were withdrawn.. That provincialization in any way affects the independence of a High Court, its prestige or its power to intervene in protection of the subject against abuse of executive authority, would be denied by those who admit in the High Court at Calcutta no superiority in these respects over the High Courts in provinces where provincialization has a history as old as and happier than the history of Bengal where there is centralization.

In a similar manner it may be argued as regards the interference of the local legislatures, that the cases collected in the appendix to the note do not establish a case for the total exclusion of discussion of all administrative acts of the High Court from the competence of the local legislatures. Many of the subjects discussed on these occasions were matters in themselves eminently appropriate for public debate. If debates were so conducted as to permit, whether by the use of irrelevant arguments or by abuse of language, any scandalizing of the Courts the remedy lies in amendment of the rules of procedure, and not in the wholesale prohibition of discussion. The argument from prestige is of course similar to the argument that an irresponsible executive is stronger than a responsible executive. In that case high authority has reached conclusions favourable to a popular executive, and it may be that reasonable discussion of a High Court's administration would enhance rather than diminish its prestige.

Positive arguments.

18. The case for provincialization, however, might perhaps find its strongest support in positive arguments. It might be argued that provincialization, in the absence of evidence to the contrary, may be taken to have worked well throughout India

(except Bengal) where it has always been the rule. It has proved itself appropriate in the varying constitutional conditions up till the present day. It will, therefore, be doubly appropriate in the new constitution, if that constitution makes any approach to provincial autonomy, or enlarges provincial functions.

But the ultimate test must be the essential nature of the administrative functions exercised by the High Court. Is their exercise a matter of provincial concern? The principle suggested by the authors of the Report on Indian Constitutional Reforms is contained in the following extract from paragraph 238 of the Report. "The Committee's first business will be to consider what are the services to be appropriated to the provinces, all others remaining with the Government of India. We suggest that it will find that some matters are of wholly provincial concern, and that others are primarily provincial but that in respect of them some statutory restrictions upon the discretion of provincial Governments may be necessary. Other matters again may be provincial in character so far as administration goes, while there may be good reasons for keeping the right of legislation in respect of them in the hands of the Government of India."

It may be argued that on that principle the administration of justice has rightly been classified as a provincial subject. It is immaterial whether the administration is entrusted to the High Court or to the local Government. The degree of provincial concern is in no way affected by the distribution of functions. The local legislature as the representative of the provincial population must have control of or influence over the administration wherever it is vested. The argument may perhaps be accepted so far as to admit that there is possibly a scope within which the provincial executive and the provincial legislature may reasonably claim that the administration of justice by the High Court is a purely provincial concern which must be treated as a provincial subject. What that scope is must be ascertained by examining in succession each of the administrative functions of the Court. A prominent instance of these functions is the power of the High Court under section 122 of the Code of Civil Procedure to amend the rules in the First Schedule to that Code. That function is "centralized" in Bengal but "provincialized" elsewhere. It may be contended that it was a fundamental principle in framing that Code that the provisions of the Act itself should affect only those matters which must preserve uniform features throughout India, and that the first schedule is a vast compendium of matters found to be appropriate for adjustment to suit the requirements of each High Court's

jurisdiction as necessity arose. The contents of the First Schedule are, therefore, matters of purely provincial concern, and the High Court's powers to amend it must therefore be subject to provincial control and influence alone.

Again the powers of the High Court to make rules, prescribe forms, and settle tables of fees are matters which satisfy the test prescribed by the Joint Authors. They are matters with which the provincial population is gravely concerned, and they are the concern of no one else. Of the same nature is the regulation of the places at which the High Court will hold its sittings.

It may also be contended, and it is in fact contended, that the composition of the subordinate judiciary, the presence and absence of nepotism in its recruitment, its integrity, and its familiarity and identity with provincial conditions are matters in regard to which the High Court's administration is a provincial concern. It may be with some show of reason argued that communal representation, so far as it has been recognized as a principle in services generally, is a not illegitimate provincial demand in the case of the subordinate judiciary; and, if popular opinion is seriously affected by it, its consideration is a purely provincial concern. Finally, however welcome the assumption of the financial burden by central revenues may be, it may be contended that the adequacy of the strength of the High Court, the facilities for obtaining justice at its hands, and any serious congestion of its business are matters on which provincial opinion is entitled to express itself even if the charges of the Court should be made provincial Consolidated Fund charges. Administrative control and financial control however must go together, and since the first must be provincial the latter must be provincial also.

APPENDIX. (SEE PARAS. 13 AND 17).

The Bengal Legislative Council.

1. On the 15th March, 1921, Maulvi A. K. Fazl-ul-Haq moved that the demand for Rs. 1,30,000 for the preparation of paper books in the High Court be refused. The cut was carried by 71 votes to 35. (Bengal Legislative Council Debates, 1921, Vol. I, No. 5, page 137.)

2. On the 22nd March, 1921, Professor S. C. Mukherjee moved that the demand for Rs. 1 lakh under the head " Civil Works " for constructing a residence for the Chief Justice of Bengal be refused. The cut was carried by 63 votes to 34. (Bengal Legislative Council Debates, 1921, Vol. I, No. 5, page 352.)

3. On the 20th March, 1922, Babu Surendra Nath Mallik moved that the demand for Rs. 50,000 for High Court paper books be refused. The cut was carried by 46 votes to 33. (Bengal Legislative Council Debates, 1922, Vol. VII, No. 5, page 95.)

4. On the 24th March, 1924, Maulvi Wahed Hossain moved that the demand for Rs. 35,940 under the head " 24A, High Court " for the provision for preparation of paper books in the appellate side of the High Court be refused. The cut was carried by 67 to 56. (Bengal Legislative Council Debates, 1924, Vol. XIV, No. 5, page 199.)

5. A year later Maulvi Muhammad Nurul Haq Chaudhury moved that the demand for Rs. 2,000 under the head " 24A, High Court Judges' travelling allowance " be refused. On this motion a number of questions was allowed to be agitated. A specimen extract is given to illustrate the tone of the debate:—

> " I may say that the quality of the justice administered by the High Court has deteriorated now. I must most respectfully say that some of the Judges who ought to preside over criminal courts are now adorning the Bench, and I must most respectfully say that they have got a distinct bias towards some of us ". (At this stage the speaker was called to order.)

The motion was put and lost. (Bengal Legislative Council Debates, 1925, Vol. XVII, No. 4, page 255.)

6. On the 17th March 1926 Maulvi Sayyed Sultan Ali moved that the grant under the head " 24-Administration of Justice " be reduced by Re. 1. The object was to call attention to the paucity of appointments of Munsiffs given to Mussalmans. The appointments are made by the High Court and the motion, therefore,

involved an attack on the High Court for 'not showing any inclination to do justice to our community in this respect.' The speaker continued:—

> "If the appointing authorities want to keep us out on the ground that it is to oblige the Hindu Munsifs, Subordinate Judges and District Judges by appointing their sons and sons-in-law and other relations, which is usually done, then let them plainly tell us that the Mussalmans will have no place in the judicial service in this province."

Further, the same speaker said:—

> "Sir, is it not simply scandalous? When the Calcutta High Court has shown obstinacy in the matter, there is no other alternative but to amend the law in such a manner as to relieve the High Court from the irksome duty of appointing judicial officers in the Provincial Judicial Service and vest it in the local Government."

The motion was eventually withdrawn, but in the meantime many undesirable things had been said. (Bengal Legislalative Council Debates, 1926, Vol. XX, No. 3, page 132.)

7. On the 16th March, 1927, Maulvi Mohamed Sadique moved that the demand of Rs. 82,000 under the head "24-A, High Court—Original side—Registrar" be refused. The alleged object of the motion was to elicit information as to the principle or principles on which there are two systems of court fees, one system of *ad valorem* court fees for the *mufassil* and the other system for the rich citizens of Calcutta for which the original side of the High Court is maintained. In the course of his speech the Member said:—

> "The Original Side of the Calcutta High Court is a standing monument of this iniquitous system—a monument which is maintained at the expense of the poor."

The motion was put and lost by 48 to 11. (Bengal Legislative Council Debates, 1927, Vol. XXV, No. 3, page 221).

Bombay Legislative Council.

8. On the 6th March 1924, Mr. R. G. Pradhan moved that item no. 157, Establishment for a tenth Additional High Court Judge, be omitted. The speaker observed that the appointment of a High Court Judge is non-votable. Consequently no demand was made by the Honourable the Home Member for the salary which will have to be paid to the additional High

Court Judge. His object in making the motion was to bring pressure to bear upon Government in order that they might consider whether it would not be possible for them to postpone the appointment of the additional High Court Judge for some time more. The speaker then went on to say that there was no other institution for which the House felt higher respect than the High Court, and he felt confident that the House would be willing to comply with any requirements the High Court might demand. At the same time, by way of disproving what he had already said, he added that he felt that the necessity for the appointment of the additional High Court Judge had not been made out. He then proceeded to say that he did not see why the remaining High Court Judges should not be able to cope with the business that they had to perform. In other words, he accused the High Court Judges either of managing their work badly or of being idle. (Bombay Legislative Council Debates, 1924, Volume XI, page 832).

9. On the following day Mr. R. D. Shinde moved that the provision for the pay of establishment,—Registrar, Appellate Side, Bombay High Court, be reduced by Rs. 86. The object of the motion was to require economy to be practised in fixing the pay of the establishment of the High Court. The motion was ruled out. (Bombay Legislative Council Debates, 1924, Volume XI, page 887.)

Madras Legislative Council.

10. On the 23rd March, 1921, Rao Bahadur T. M. Narasimhacharlu moved that the provision of Rs. 50,520 made for 26 Bench Clerks in the High Court be reduced by the cost of four clerks. The motion was made on the grounds of economy, and was supported by Mr. R. K. Shanmukham Chetty, who took the opportunity " of drawing the attention of the House to the way in which the affairs of the High Court are administered, especially the way in which recruitments are being made for the judiciary." Among other things, he said "I see that the way in which the High Court have recruited District Munsifs is not at all satisfactory", and he concluded by saying, " I support the motion because I am not satisfied with the way in which the High Court is administering justice in the matter of recruitment". The motion was withdrawn. (Madras Legislative Council Debates, 1921, Vol. I, pages 1085 to 1087.)

11. On the 15th March, 1923, Rao Bahadur T. B. R. Nayudu moved to reduce the allotment for Translators and clerks of the High Court by Rs. 15,852. The motion was not pressed. (Madras Legislative Council Debates, 1923, Vol. XIII, page 2410.)

12. On the same day Rao Bahadur C. N. Mudaliyar moved to omit the allotment of Rs. 5,45,234 for the High Court and stated that he intended to press the motion to a division. He said that he had noticed and had mentioned in the House many times that the High Court in the Judicial Department had been consistently disregarding the resolutions of the House and the various communal Departmental Orders thereon. He went on to say that if the High Court was not amenable to the wishes of Government, it was the duty of the House to address the Secretary of State immediately to bring the High Court to order. The communal claim, which had been accepted by the Government of India and the Legislative Assembly, had now become an all-India question. He complained that the resolutions of the Madras Government had not been given effect to by the High Court. He went on to say that persecution had replaced the original oppression. The motion was apparently made for the purpose of saving the non-Brahmin community. (Madras Legislative Council Debates, 1923, Vol. XIII, page 2412.)

13. On the 22nd March, 1924, Mr. A. Ramaswami Mudaliyar moved that the allotment to the High Court be reduced by Rs. 1,000, firstly in connection with the right of the High Court to appoint District Munsifs, and secondly in relation to the patronage exercised by the High Court. The debate turned mainly on the desirability of giving communal representation in the appointment of District Munsifs. (Madras Legislative Council Debates, 1924, Vol. XVII, page 981.)

14. On the 24th March, 1925, Mr. S. Satyamurti moved a cut of one lakh from the allotment for Judges and Registrar of the High Court. The intention of the motion was to recommend the reduction of the strength of the High Court from 14 to 12. During the debate the Honourable Mr. C. P. Ramaswami Ayyar who was the Law Member remarked "It is not right, it is not expedient, it is not wise to traverse the question of the equipment of Judges on the floor of this House. The High Court and the personal equipment of the Judges of the High Court must be matters beyond controversy on the floor of the House. All that I wish to say is that these Judges with the best will in the world have been attempting to do their work but have still got arrears." The debate proceeded at great length, and finally the cut was carried by 31 votes to 28. This was followed by a further motion for a cut of Rs. 1,111 from the allotment for High Court Judges and Registrar. Here, again, the question raised was purely communal, in respect of appointments. An amendment to the cut by which it was reduced to a cut of

one rupee was accepted. (Madras Legislative Council Debates, 1925, Vol. XXIII, pages 664 to 680.)

15. On the 20th March, 1926, Mr. A. R. Mudaliyar moved that the allotment for Judges and Registrar be reduced by Rs. 101. He proposed to make High Court Judges work on Saturdays. The motion was withdrawn. Another motion for a cut of Rs. 100 was made by Khan Bahadur P. Khalif-ul-lah Sahib Bahadur, and the tone of that motion was purely communal. It referred to the appointment of Sir Abdur Rahim as Executive Council Member in Bengal and the failure to fill the vacancy caused in the Bench of Madras with a Muhammadan. This resulted in a lengthy debate, at the end of which the motion was withdrawn. This was followed by a motion by Mr. A. R. Mudaliar for a cut of one lakh from the allotment for the High Court. This dealt with the appointment of subordinate Judges by the High Court. The motion was withdrawn. It was followed by a token cut of one rupee ' to urge upon the Government the necessity of appointing Mussalmans whenever opportunity occurs in respect of the posts of High Court Judges, Legal Remembrancers and officers like that'. (Madras Legislative Council Debates, 1926, Vol. XXIX, pages 372, 374 and 394.)

16. On the 21st March 1927 Mr. Sami Venkatachalam Chetti moved for a cut of Rs. 100 in the allotment of Rs. 68,400 for the pay of officers. In doing so, he desired to draw the attention of the Government to the retention of temporary Judges. For the past five or six years it had become the practice to keep one or two High Court Judges temporarily. He went on to say that after all, however Honourable the High Court Judges might be, it was just possible that there could be no inducement for the speedy disposal of arrears so long as they were put on temporary rations, and that the Judges of the High Court were not suitable persons to decide whether Additional Judges were necessary. He said that he believed it ought to be a very delicate matter for the Honourable Judges of the High Court to say that two of their colleagues were not necessary. He went on to say that it was therefore better not to refer the matter of the appointment of extra Judges to the Judges of the High Court at all, but to refer it to a representative body more largely representative of clients than of Vakils and examine the question of accumulation of arrears, and that it would then be known whether the accumulation of arrears was due to the want of more Judges or to the want of speedy disposal of cases by the permanent Judges. There is a very unpleasant reflection on Judges of the High Court in the following passage which occurs in his speech—

" There is another reason, Sir, why Judges

ought not to be kept up for temporary periods. That will be giving a power in the hands of the executive, and the Honourable the Judges will naturally be looking up to the Executive Government for their extension." The motion was carried by 50 votes against 30. (Madras Legislative Council Debates, 1927, Vol. XXXV, page 577.)

17. On the following day Mr. S. Satyamurti moved that the allotment for the pay of establishments of the High Court be reduced by Rs. 100. He said that his object was to discuss the treatment meted out to the *Madras Weekly Notes* by the High Court. It appears that the *Madras Weekly Notes* published an article on the subject of the promotion of Barrister Judges to the position of Chief Justice, that the High Court had taken offence and, by way of punishing the Editor of the *Madras Weekly Notes,* had withdrawn the privilege of access to the records of judgments previously enjoyed by that paper for reporting. Mr. Satyamurti proceeded to say that he found it very surprising that the highest court of justice, which was asked every day to upset the orders made by the subordinate judiciary, civil and criminal, on the ground that they had gone against the fundamental maxim of justice, namely, that even a murderer deserves to be heard before he is hanged, should have in a matter like this exhibited such temper as to punish a man without giving him a chance of saying yes or no in his defence. The motion was carried by 51 to 41. (Madras Legislative Council Debates, 1927, Vol. XXXV, page 626.)

Bihar and Orissa Legislative Council.

18. On the 7th March, 1922, Babu Ganesh Datta Singh moved that the item of Rs. 3,000 for duty allowance be omitted. This apparently referred to the establishment of the Deputy Registrar and Assistant Registrar of the Patna High Court, and the motion was directed against the system of appointment of Deputy Registrars and Assistant Registrars from the Munsifs. The motion was carried by 17 votes to 12. (Bihar and Orissa Legislative Council Debates, 1922, Volume IV, page 1079.)

19. On the same day Babu Nirsu Narayan Singh moved to reduce by Rs. 1,000 the provision for the High Court. The mover began by saying that he felt it a painful duty to place before the Council the grievances which the people have against the High Court on its administrative side. He said that the first grievance was that no Bihari or Oriya had been appointed a Deputy Registrar, and in the lower grades, for instance in the Accounts Department, there was not a single Bihari. He went on to say that Biharis were excluded "because if any man has anything to do with the Accounts Department of the Patna

High Court, he would come to know that the Accounts Department is full of bribery and that no man can draw a penny from that department without paying something to it." He then proceeded to reflect on the Translation Department of the Patna High Court. The Honourable the Government Member pointed out that the motion amounted to a vote of censure on the administrative capacity of the Honourable Judges of the High Court. The motion was put and carried by 27 votes to 15. (Bihar and Orissa Legislative Council Debates, 1922, Volume IV, page 1086.)

20. On the 23rd August, 1922, Babu Ganesh Datta Singh moved for omission of the supplementary grant of Rs. 2,407 for temporary establishment and of Rs. 5,250 for contingencies in connection with the appointment of two Additional Judges to the Patna High Court. His contention was that the utmost the Court should ask for was one additional Judge. His remedy was that the High Court should sit the whole day on Saturdays. He also moved for the omission of the supplementary grant of Rs. 3,168 for the paper book establishment of the High Court. His second motion was withdrawn and the original motion was negatived. (Bihar and Orissa Legislative Council Debates, 1922, Volume V, pages 763 and 770.)

21. On the 18th March, 1925, Mr. Shiva Shankar Jha moved that the demand under the head '24-Administration of Justice' be reduced by Rs. 100. The object of the mover was to criticise the Government for attempting to dictate to the High Court. The motion was apparently based on some correspondence, and the allegation was that the local Government wrote to the High Court protesting against a judgment of the High Court and asking for an explanation from the High Court. The High Court for their part declined to enter into correspondence with Government and protested against the interference by the Executive. The Government Member repudiated the charge and accused the mover of endeavouring to make bad blood between the executive Government and the High Court. The motion was carried by 41 votes to 27 (Bihar and Orissa Legislative Council Debates, 1925, Volume II, page 1441.)

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